No. 11295

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANCIS P. O'LEARY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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I.

Comments on Respondent's Treatment of the Facts in the Case.

A. IN GENERAL.

We note that Respondent (Br. p. 2) agrees with us that the case is based entirely on circumstantial evidence. As to the facts in the case, we find nothing in Respondent's Brief which contradicts or suggests any material omission in the statement of facts and circumstances as detailed in Appellant's Opening Brief.

We fail to find in the brief any attempt to supply any of the "deficiencies in the evidence" set forth in detail in Appellant's Opening Brief at pages 13 *et seq.* It is unnecessary to here repeat these deficiencies, but we respectfully again call the Court's attention to them.

B. Defendant's Position When First Seen After Shots Were Heard.

A cursory reading of Respondent's Brief tends to leave the impression that the evidence shows that the first time defendant was seen after the shots were heard he was standing in the doorway of the Captain's office. Such is not the fact. Defendant was first seen by the purser, witness Kennon, and at that time was not in the doorway, but in the passageway at the point marked "C" on Government's Exhibit No. 1 (which point, according to the testimony of the witness Zents, was at least 12 or 14 feet from said doorway), or was at the head of the stairs adjacent to said point "C" and at a greater distance from said door. Defendant, from this point, walked to the door with Kennon before he stood in the doorway and made the alleged statement, "This will hold you for a while," attributed to him by witness Zents. The evidence pertaining to this particular point, together with the references to the transcript, are set forth in detail in Appellant's Opening Brief (pp. 13-14).

C. The Testimony as to the Stain on Defendant's Forearm.

Respondent's Brief (p. 18) refers to the testimony of the witness Dunn to the effect that he saw a stain on one of defendant's forearms which he thought was blood after defendant had been taken into custody. In this connection, Respondent ignores entirely the testimony of witness Meacham, who was with Dunn at the time the stain was noticed, and also ignores the testimony of the many other

witnesses, including those who placed the handcuffs on defendant and who were in a position to notice any blood stains which might have been on defendant's person. We have thoroughly discussed all the evidence pertaining to blood stains in Appellant's Opening Brief (p. 35 *et seq.*) and respectfully refer the Court thereto, and especially to the authority there cited, as our answer to Respondent's contentions in this regard.

II.

Reply to Respondent's Points and Authorities.

A. Respondent's Contention That Appellate Courts Will Indulge All Reasonable Presumptions in Favor of the Trial Court.

We do not question the soundness of this principle as a general rule but, nevertheless, we do assert that this rule has its limitations and is subject to the equally important and well-settled rule that in cases where the evidence is entirely circumstantial, such evidence, in order to support a conviction, must exclude every reasonable hypothesis except that of defendant's guilt and, likewise, "when all of the substantial evidence is as consistent with innocence as it is with guilt, it is the duty of the Appellate Court to reverse a conviction."

> *Neal v. United States* (C. C. A. 8), 102 F. (2d) 643.

See, also:

> *McClintock v. United States* (C. C. A. 10), 60 F. (2d) 839 at 842.

On the point now under consideration, the cases cited by Respondent are clearly distinguishable from the instant case. Three of them, namely,

Henderson v. United States (C. C. A. 9), 143 F. (2d) 681;

Morton v. United States (C. A. D. C.), 147 F. (2d) 28;

Perovich v. United States, 205 U. S. 86, 51 L. Ed. 722,

may be taken as examples.

In the *Henderson* case, this Court (p. 682) used the following language:

> "It is a familiar principle, which it is our duty to apply, that an appellate court will indulge all reasonable presumptions in support of the rulings of a trial court and therefore that it will draw all inferences permissible from the record, and in determining whether evidence is sufficient to sustain a conviction, will consider the evidence most favorably to the prosecution, * * *."

We make no contention that this is not a correct statement of the law. However, we do contend that this decision is not in point in the instant case. In the first place, it was not a case based on circumstantial evidence. Defendant Henderson was shown by the evidence to be an officer or agent of the United States Government, namely, the Chairman of a War Price and Rationing Board. He was charged with embezzling 250 "A" Gasoline Rationing Coupons. The evidence introduced positively showed that these coupons had come into the possession of the Board, of which he was Chairman; that the

coupons on their face showed them to be the property of the United States Government; that he had taken them from the office of the Board under orders to burn them; that he had them on his person, and while away from the office of the Board, and under suspicious circumstances, had transferred them to another person for a consideration received by defendant.

The Court held that this evidence was sufficient to raise the reasonable inference that defendant had not acquired the coupons in his private capacity but in his official capacity and that he had violated his trust and embezzled the coupons.

In the *Morton* case, which was a homicide case, there was positive and direct evidence of the following facts:

The dead body of the woman victim was found in a park, badly beaten and bruised, with a fractured skull, crushed nose and a brain hemorrhage. Defendant admitted having been with her in the park and that he had slapped her. Blood was found on his hands, arms and privates, and also bloodstained clothing was found in his closet. Also, there was found a broken whisky bottle near the body of the victim, identical with one purchased by the defendant from a liquor dealer prior to the killing. The dealer further testified that defendant had come back for more liquor with blood on his clothing.

All these and other facts were established by positive and direct evidence, and it was upon these facts that the Court held the jury had the right to infer defendant's guilt.

Likewise the *Perovich* case, cited by Respondent, bears no comparison with the instant case. Some nine days before the killing, and after defendant had been to the

cabin of deceased on several previous occasions, defendant, in company with a witness, again visited the cabin and on leaving defendant had stated to the witness (p. 723) "that he had been there several times before, and that the deceased had a roll of money, and that he would lick him with an ax some day and throw him in the water, or that he would make a fire and burn everything up." Further positive and direct evidence was introduced showing that certain personal property, including a gold watch and chain, were subsequently in defendant's possession. Defendant, prior to the killing, had stated that he was broke and after the killing had made contradictory statements concerning his possession of the watch. The positive proof further showed that the cabin of deceased had been burned and the dead body of the deceased had been found therein burned to such an extent that the bones crumbled to pieces when touched.

It is easy to see how this positive and direct evidence, when reasonably construed, excludes every other reasonable hypothesis than that of guilt. It is important to note also that in the *Perovich* case the evidence showed a motive, to-wit: larceny and a threat to kill the deceased by the exact means by which deceased actually met his death. None of these elements are present in the instant case.

When we consider the facts established by positive, direct and "substantial" evidence in each of the three cases last commented upon and compare them with the facts established by the record in the instant case, we can understand what prompted the trial court, in the instant case, to state it as its opinion that "the case was not a strong one." [R. 108, top.]

Where, we ask, is there anything in the record in the instant case, in the form of positive, direct or substantial evidence, to compare in any degree with the facts above outlined in each of the three cases discussed above?

As we have argued at length in our Opening Brief, there is nothing in the evidence in the instant case which even tends to show defendant's participation in the shooting of Captain Fithian, except possibly, that he had an opportunity to commit the crime (and there is no showing that no one else had such opportunity, but, on the contrary, a number of persons had such opportunity), and certain statements of defendant, none of which tend to exclude the hypothesis of defendant's innocence.

The language of this Court in the opinion on rehearing in *Kennedy v. United States,* 44 F. (2d) 131 at 134, is applicable here:

> "In the absence of evidence of importation, there is, of course, no room for presumptions of any kind."

B. Function and Duty of Appellate Court Where Appeal Is Based on Refusal of Motion for Directed Verdict.

In Appellant's Opening Brief, at page 9 *et seq.,* Appellant advanced the argument that Federal Courts, including this Court, in a long line of decisions have laid down the rule that "in criminal cases where the evidence is circumstantial, an accused is entitled to, and the trial court must give, an instruction to the jury to return a verdict of not guilty unless there is substantial evidence of facts which excludes every reasonable hypothesis except that of guilt, and that such evidence must be inconsistent with every reasonable hypothesis of innocence." Appellant's

Opening Brief (p. 9) cites some eight cases, two of them decisions of this Court, to sustain this contention.

Respondent in its Brief (p. 9) agrees with this contention of Appellant. The Brief, inferentially, attempts to deny the efficacy of this rule or its applicability to the case in its present status. It does this by a reference to certain instructions given by the trial court but, we submit, that the question as to whether or not the trial court properly instructed the jury in the instructions referred to in the Brief is entirely beside the issue which now confronts this Court. When the several motions for a directed verdict were made the question which confronted the trial court was whether or not the competent and substantial evidence then before the Court and jury was sufficient to "exclude every other reasonable hypothesis except that of guilt." It was the duty of the trial court to, itself, determine this question and if it found that the evidence did not meet this requirement it was its duty to give only one instruction, namely, to find the defendant not guilty. This Court, on this appeal, is confronted with the same situation. See:

> *Paul v. United States* (C. C. A. 3), 79 F. (2d) 561,

and quotation therefrom found at page 11 of Appellant's Opening Brief.

Under the heading, "Rule Applicable on a Motion for a Direct Verdict" (Resp. Br. p. 6), Respondent cites several Federal decisions, of which *Maugeri v. United States* (C. C. A. 9), 80 F. (2d) 199, is an example. (Incidentally, it may be noted there is a dissenting opinion in this case.) It is true that this court in said last mentioned

case did use the language found in the quotation in Respondent's Brief, but, manifestly, it could not have intended that this language with the use of the disjunctive word "or" should be taken literally. We cannot conceive that this Court intended to lay down the rule that if there be *any* competent evidence before the jury, a motion for an instructed verdict should be denied, notwithstanding the fact that such evidence may be unsubstantial and lacking in character and extent to prove one or more of the essentials of the crime. If a literal construction of the quoted language was intended, then this Court could not justify its decision in *Kennedy v. United States* (C. C. A. 9), 44 F. (2d) 131, in which there certainly was considerable competent and legal and proper evidence before the jury and yet this Court held the refusal of the lower court to grant defendant's motion for an instructed verdict to be fatal error.

Again, the decisions cited by this Court in *Maugeri v. United States, supra,* to sustain its ruling show that this Court did, in fact, have the true rule in mind, namely, that the evidence must be proper, legal, competent *and* substantial. Thus, the quotation from the Supreme Court of the United States in *Abrams v. United States,* 250 U. S. 616, 619, 40 S. Ct. 17, 18, 63 L. Ed. 1173, reads as follows:

> "A question of law is thus presented, which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, *competent and substantial,* before the jury, *fairly tending to sustain the verdict.*" (Cases cited.) (Italics ours.)

Likewise, in *Borgia v. United States,* 78 F. (2d) 550 at 555, cited by Respondent, we find the following language:

> "As in all cases requiring proof by circumstantial evidence, the conclusion of guilt must follow beyond reasonable doubt from the facts and circumstances proved; but where there is, as here, *substantial evidence to support every essential ingredient of the crime charged,* the question is for the jury. *Rosegarten et al. v. U. S.,* 32 F. (2d) 644, 645 (C. C. A. 6)." (Italics ours.)

It is our contention that a careful review of the record fails to reveal any competent and substantial evidence justifying any reasonable inference of defendant's guilt, much less that it was sufficient to "exclude every other reasonable hypothesis except that of guilt."

C. Absence of Evidence of Finger Prints.

In Appellant's Opening Brief (p. 15), Appellant advances the argument that the failure of the Government to produce evidence as to the finger prints, if any, on the gun found near the Captain's feet, or to offer any explanation as to why such evidence was not produced, raised the presumption that if said evidence had been produced it would have been adverse to the contentions of the Government and might have been conclusive in defendant's favor, and cited some three authorities, two of them decisions of the Supreme Court of the United States to sustain this contention. We again respectfully refer the Court to said Opening Brief on this point.

Respondent's Brief (p. 20) attempts to excuse this omission of the Government by assuming a number of

hypothetical conditions. For instance, the fact there were no finger prints on the gun, the difficulty, if not the impossibility of ascertaining whether or not if there were any finger prints on the gun and the assumption that the manner in which the gun was picked up by the Chief Boatswain of the Navy and handed to a naval officer, notwithstanding the careful handling of such gun, would obliterate any finger prints that might be thereon. While we do not admit, but, on the contrary deny, the assumed conclusions of the Government in this connection, yet, if such be the fact, why, we ask, did the Government not establish this on the trial by evidence in the case? Why did the Government delay in apprising us of its contention in this connection until the preparation of its Brief on this appeal and then present it, not as a fact shown by the record or in evidence at the trial, but merely as an argument on this appeal?

There were two sets of investigating officers aboard the vessel the night of the shooting, viz., the Coast Guard and the Naval Officers. They used great care in picking up the gun and wrapping it in a handkerchief. Manifestly, this was to preserve it in its then condition and to prevent any obliteration of any finger prints that might be thereon, and to prevent any other finger prints from being placed thereon. In other words, they had it in mind to examine the gun for finger prints, and there is nothing in the record to show that such examination was not in fact made, much less that the officers of the United States Navy and Coast Guard did not possess the capacity to make such examination.

In Appellant's Opening Brief (p. 16) we cited some three decisions, one of them from this Court and the other

two from the Supreme Court of the United States, the latter including the leading case of

> *Clifton v. United States,* 4 How. 242, 247, 11 L. Ed. 957, 959,

which is the basis for this Court's ruling on the point under discussion in *Hung You Hong v. United States* (C. C. A. 9), 68 F. (2d) 67.

Respondent's Brief, while attempting to distinguish the ruling of this Court in the last case above mentioned, fails to refer in any way to either of the two Supreme Court decisions.

Concerning *Morton v. United States, supra,* cited by Respondent on this point, we have already discussed the facts in that case (*supra,* p. 5) and shown, as we believe, their total dissimilarity, both in their nature and extent, to the instant case. In other words, in the *Morton* case there was abundant evidence, direct and positive, to show defendant's participation in the crime without any resort to the other evidence which the accused claimed should have been produced. Whereas, in the instant case, there is nothing in the evidence to show defendant's participation in the shooting except that he had an opportunity to commit the crime (and it is not shown that no one else had such opportunity, but, on the contrary, several others had such opportunity) and certain statements made by defendant, none of which amounted to a confession or an admission, and all of which are susceptible of a reasonable construction favorable to defendant.

We repeat what we stated in our Opening Brief (p. 15):

> "It is reasonable to presume that the hand which held the gun when it was discharged left its finger prints thereon. This would have been vital and perhaps conclusive evidence that the person whose finger prints corresponded with those found on the gun fired the fatal shots."

D. The Figure on the Bridge.

In Appellant's Opening Brief (p. 19), in discussing the question of defendant's opportunity to commit the crime, we advanced the argument that not only did the evidence fail to show that no other person had such opportunity, but that, on the contrary, the evidence showed that many of the officers and men of the vessel had a like opportunity, and, in particular, we pointed to the testimony of witness Watson to the effect that he had seen the figure of a man on the wing deck of the ship which was in closer proximity to the Captain's office, and this immediately prior to the time the shots were heard.

Respondent's Brief, in discussing this question, calls attention to the testimony of several witnesses to the effect that the Captain had often been seen by them on other occasions on this wing deck, and asks this Court to presume from this evidence that the figure seen by witness Watson must have been that of the Captain. There is no evidence that no person other than the Captain was ever seen on this wing deck. Watson, an ordinary seaman on this vessel, was undoubtedly familiar with the figure of his Captain. Again, the evidence shows, without contradiction, that the Captain himself had gone to bed and

was asleep some time before the figure was seen on the wing deck. [Testimony of Noble, R. 99, 100.]

If it were true, as Respondent's Brief suggests, that the figure on the wing deck was that of the Captain and that he heard the argument between Cooper and defendant on the deck below and observed defendant's drunken condition, it would have been natural for him to have expressed his disapproval of this conduct and called to defendant to cease the altercation and go to his quarters. The evidence fails to indicate that anything of this kind occurred.

Again, if, as assumed by Respondent in its Brief, the Captain was aware of defendant's drunken condition and had seen and heard the altercation with Cooper, it would have been but natural for him, when defendant approached him, to be on the alert and to have made some effort to protect himself against the attacks of this infuriated drunken man. It must be remembered that the evidence shows the Captain to have been perfectly sober at the time of his killing. There was no evidence of any altercation between the Captain and his assailant, whoever he was. The position and condition of the Captain's body when discovered would indicate that he died without a struggle.

It is submitted that these substantial facts, established by the evidence, render it improbable, if not impossible, that the imaginary story assumed by Respondent in the conclusion to its Brief could be true. Respondent asks this Court to presume that the figure seen by Watson on

the wing deck was that of the Captain solely because the evidence showed that the Captain had been seen on this wing deck on other occasions.

We submit that this Court cannot comply with this suggestion without doing violence to its ruling in the case of *Kennedy v. United States,* 44 F. (2d) 131. In that case, it was essential for the Government to prove that the liquor in question had been imported from the outside into the United States. The containers of the liquor bore labels indicating that the liquor was of English and Scotch origin. While the Court held that this was a relevant circumstance and of some weight on the question of the source of the liquor, it further held that it was totally insufficient to prove the importation or to justify an inference by the jury that it had been imported. This Court even went so far as to assume the possibility that the liquor had been falsely and fraudulently branded in order to deceive and this, notwithstanding the rule that an Appellate Court in such cases will construe the evidence most favorably to the Government.

A similar situation arises in *McClintock v. United States, supra,* in which the refusal of the trial court to grant a motion for an instructed verdict was held fatal error. In that case defendants were charged with a scheme to defraud involving, among other things, false and fraudulent representations as to the value of certain stocks and securities. A letter written by defendant McClintock to one of the victims was introduced in evidence. In this letter McClintock, an attorney at law, stated that

he had been informed by one Stout, a co-defendant, that the stock in question had been sold at par. The evidence showed that this was not true but, instead of indulging in the presumption that McClintock had intentionally made this false statement with intent to defraud, the Court assumed the opposite, saying in that connection (p. 842):

> "It was not shown that one of the parties present did not make the statements attributed to Stout, nor that such statements were untrue. McClintock may have innocently misstated the name of the person making such statements."

Conclusion.

In Appellant's Opening Brief we endeavored to, and believe that we did, set forth and analyze all of the "substantial" evidence. We likewise endeavored to, and believe we did, show that the reasonable interpretation of every fact shown by such "substantial" evidence was not inconsistent with every reasonable hypothesis other than that of defendant's guilt.

We submit that there is nothing in Respondent's Brief which overcomes the case made by Appellant in said Opening Brief, either on the facts or on the law. The whole argument of Respondent is based solely on *inferences* and *presumptions,* but there is no *substantial* evidence in the record justifying any inference or presumption that defendant fired the shots that killed Captain Fithian.

Respondent's argument in this connection is subject to the criticism made by the Court of Appeals of the State

of New York in *People v. Taddio,* 292 N. Y. 488, 55 N. E. (2d) 749, from the opinion of which we have quoted at length in Appellant's Opening Brief at pages 36 and 37, to which we again refer this Court.

The substantial evidence and all reasonable and legitimate inferences and presumptions that may be drawn therefrom, when aided by the presumption of defendant's innocence, does not "exclude every other reasonable hypothsis except that of guilt."

It is respectfully submitted that the judgment and conviction should be reversed.

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